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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JARED MICHAEL WAGONER, Petitioner.	2 CA-CR 2008-0021-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060422

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 In this petition for review, petitioner Jared Wagoner challenges the trial court's order denying the petition for post-conviction relief Wagoner filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons stated below, we deny relief.

¶2 Wagoner was charged with one count of criminal damage, four counts of endangerment, and three counts of aggravated assault. Pursuant to a plea agreement, he was convicted of one count of criminal damage and three counts of aggravated assault. At the change-of-plea hearing, although he seemed to be admitting culpability and the requisite intent as to most of the charges, Wagoner made conflicting statements about his intent, insisted he had no recollection of the events, and essentially pled no contest based on *North Carolina v. Alford*, 400 U.S. 25 (1970). Defense counsel urged the trial court to impose mitigated, concurrent sentences, but the court sentenced Wagoner to presumptive prison terms of 2.5 years on the first count and 3.5 years on the remaining counts, all terms to be served consecutively.

¶3 In his petition for post-conviction relief, Wagoner asserted numerous claims; we discuss only those he raises in his petition for review. *See generally* Ariz. R. Crim. P. 32.9. Wagoner asserted that, at the time he entered his plea, neither the court nor defense counsel had assured that he was "afforded the[] protections" to which he claims he was entitled under *State v. Reynolds*, 25 Ariz. App. 409, 413, 544 P.2d 233, 237 (1976), after he told the court he recalled nothing of the incidents that gave rise to the charges. He also contended counsel had been ineffective because he had not challenged the unduly suggestive identification procedure pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). Wagoner contended he was thereby prejudiced because counsel "would have been in a much more advantageous position to negotiate a better plea bargain for Petitioner." Additionally, Wagoner asserted counsel had been ineffective at sentencing in failing to procure and produce evidence in mitigation. Wagoner argues on review that at the very least

he was entitled to an evidentiary hearing on this claim. He also claimed, generally, that defense counsel failed to keep him informed of the status of the case, failed to apprise him of the materials provided by the state, and did not adequately investigate Wagoner's medical condition or seek to have him evaluated pursuant to Rules 11 and 26.5, Ariz. R. Crim. P.

¶4 Noting Wagoner never filed a notice of post-conviction relief, *see* Ariz. R. Crim. P. 32.4, the trial court addressed the claims in any event. It did so in a thorough minute entry that identified the various claims and resolved them in a manner that permitted this court to review the order. *See State v. Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d 945, 959 (App. 2007). No purpose would be served by rehashing the court's order here. *Id*. Having reviewed the order and the record before us, we conclude the trial court did not abuse its discretion by denying Wagoner's request for post-conviction relief. *See State v. Taylor*, 216 Ariz. 327, ¶ 12, 166 P.3d 118, 122 (App. 2007) (reviewing court will not disturb trial court's ruling on petition for post-conviction relief absent abuse of discretion). Therefore, we adopt the court's order.

¶5 We do note, however, as Wagoner does on review, one troubling portion of the trial court's minute entry. The court stated that, because Wagoner had "not presented an affidavit from counsel and no evidentiary hearing has been held," no evidence existed to support Wagoner's claim that counsel had been ineffective by not sharing with Wagoner police reports, photographs of the crime scene and of his injuries, and information that not all the victims had been injured. The court made the same comment with respect to Wagoner's contention that counsel had failed to produce mitigating evidence at sentencing. Wagoner asserts that is precisely why he should have been afforded an evidentiary hearing.

See State v. Verdugo, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (App. 1995) (petitioner has raised "colorable claim" and is entitled to evidentiary hearing if, assuming factual allegations are true, he would be entitled to relief). But the court's further findings make clear it concluded Wagoner had not raised a colorable claim for relief that entitled him to an evidentiary hearing.

¶6 To state a colorable claim of ineffective assistance of counsel, a defendant must allege that counsel's performance fell below objective standards of reasonableness and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A colorable claim warranting an evidentiary hearing is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Based on the record before us, we cannot say the trial court abused its discretion in concluding that summary dismissal of these claims was justified. The record, including the transcript of the grand jury proceeding, which the trial court expressly incorporated at the change-of-plea hearing, establishes that Wagoner had been involved in an altercation in a nightclub; the manager and other employees of the establishment tried to remove him from the premises; and Wagoner then drove his girlfriend's truck into the front doorway of the nightclub, where three victims were standing within the open doorway. None of the information Wagoner asserted counsel had failed to provide him would have changed the sufficiency of the record to support the plea, which clearly was knowing, voluntary, and intelligent. Nor would it otherwise entitle him to post-conviction relief. Similarly, the court

also reconsidered the propriety of the sentences it had imposed in light of the purportedly mitigating evidence and confirmed that presumptive terms were warranted.

¶7 We also note that "[i]t is well established that entry of a valid guilty plea forecloses a defendant from raising nonjurisdictional defects." *See State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984) (footnote omitted). That includes claims of ineffective assistance of counsel, other than claims related to the validity of the plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). To the extent some of Wagoner's claims do not concern the validity of the plea, they were waived. The waived claims include, at a minimum, Wagoner's claim that trial counsel had been ineffective for failing to challenge the identification procedure. Although he attempts to connect that claim to his plea by asserting he would have been offered a more favorable plea agreement had counsel been successful, that assertion is speculative and attenuated at best.

¶8 The petition for review is granted. But, for the reasons stated, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge